Aliante Gaming, LLC d/b/a Aliante Casino and Hotel *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165, affiliated with UNITE HERE. Case 28–CA–126480

August 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On March 17, 2015, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent and General Counsel filed separate exceptions, supporting briefs, answering briefs, and reply briefs. The Charging Party filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

This case presents two issues related to the discipline and discharge of employee Maria Lourdes Cruz Sanchez: (1) whether the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and subsequently discharging Cruz Sanchez because she was a union officer and engaged in union activity; and (2) whether the Respondent violated Section 8(a)(1) by telling Cruz Sanchez not to discuss her suspension.

Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),[2] the judge found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily suspending and discharging Cruz Sanchez. We agree.[3]

The judge also found that the Respondent did not violate Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from discussing their discipline with other employees.[4] Contrary to the judge, we find that Buffet Manager Bonnie Schaeffer-Rabonza's statement to Cruz Sanchez to "do me a favor, go home and don't tell anybody, because nobody knows anything about [the suspension]," was unlawful. The statement impinged upon Cruz Sanchez' Section 7 right to discuss discipline with her fellow employees, and the Respondent failed to present any business justification for the restriction. See *Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds*, 362 NLRB No. 155, slip op. at 2 (2015) ("prohibition of the discussion of discipline reasonably tends to interfere with the exercise of protected Section 7 rights and is therefore unlawful unless outweighed by a legitimate and substantial business justification"); *Inova Health System*, 360 NLRB No. 135, slip op. at 6–7 (2014), enfd. 795 F.3d 68 (D.C. Cir. 2015) (finding that an employer violated Section 8(a)(1) of the Act when it directed an employee not to discuss her suspension with anyone except her husband, and failed to present a business justification).

[1] We shall amend the judge's conclusions of law consistent with our findings herein, and modify the judge's recommended Order, set forth in full below, to conform to our findings and the Board's standard remedial language, and in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We shall substitute a new notice to conform to the Order as modified.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding of a violation under *Wright Line*, supra, we rely on *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011), and not the cases cited by the judge in footnote 13 of his decision.

[3] We agree with the judge that several factors, including the timing of the Respondent's action, its disparate treatment of Cruz Sanchez, its failure to fully investigate the alleged misconduct, and its shifting explanations, evince animus. We do not, however, rely on the judge's finding that Vice President of Human Resources Rich Danzak's instruction to Director of Security Cara Welk to discard union flyers left in the employee cafeteria is evidence of animus. Danzak directed that the fliers be discarded after the Union left the cafeteria in accordance with the Respondent's practice of discarding unapproved postings, and the General Counsel does not contend that this practice was unlawful or that it was disparately applied to union material.

In finding animus, the judge also relied on Vice President of Hotel Operations Michelle Garcia's statement that she is "concerned about the recent (seemingly) spike in union activity" and that it "bums [her] out that [some employees] believe that's a better way"; President and General Manager Terrance Downey's response that he was "very concerned [and had] been talking about it [with a colleague]"; and Risk Manager Heidi Heath's advice to employees that they could "call the police and file harassment charges [against unwanted union solicitors who appear at employees' homes]." We do not rely on those statements by themselves to establish animus, but consider them as part of the totality of the circumstances. We note, however, that the General Counsel has met his burden to establish animus even if those statements are not considered.

[4] In dismissing this allegation, the judge found it "significant that [Cruz Sanchez] never testified that she thought the suggestion given by Rabonza was offensive, unreasonable, and coercive or tended to chill her right to discuss the discipline with others." We note that the subjective effect of the statement on Cruz Sanchez is irrelevant, as the Board applies the objective standard of whether a remark tends to interfere with the free exercise of employee rights, and does not consider its actual effect. See *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001).

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 4.

4. The Respondent violated Section 8(a)(1) of the Act by prohibiting Cruz Sanchez from discussing with other employees the discipline issued to her on April 4, 2014.

ORDER

The National Labor Relations Board orders that the Respondent, Aliante Gaming, LLC d/b/a Aliante Casino and Hotel, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily disciplining or discharging employees because of their union activities or to discourage employees from engaging in union or other protected concerted activities.

(b) Prohibiting employees from discussing with other employees any discipline issued to them or matters under investigation absent a substantial and legitimate business justification for doing so.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Maria Lourdes Cruz Sanchez full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

(b) Make Maria Lourdes Cruz Sanchez whole for any loss of earnings and other benefits suffered as a result of the unlawful suspension and discharge, in the manner set forth in the remedy section of the decision.

(c) Compensate Maria Lourdes Cruz Sanchez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline and discharge on April 4 and 8, 2014, of Maria Lourdes Cruz Sanchez for the April 3 interaction with Terrance Downey, and within 3 days thereafter, notify her in writing that this has been done and that the discipline will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its existing properties in the Nevada area copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 3, 2014.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 23, 2016

_____
Mark Gaston Pearce, Chairman

_____
Kent Y. Hirozawa, Member

_____
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ""Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily discipline or discharge you because of your union activities or to discourage you from engaging in union or other protected concerted activities.

WE WILL NOT discipline or discharge you because of your activities with or support for Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165 affiliated with UNITE HERE, or any other labor organization.

WE WILL NOT prohibit you from discussing with other employees any discipline issued to you or matters under investigation absent a substantial and legitimate business justification for doing so.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Maria Lourdes Cruz Sanchez immediate and full reinstatement to her former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and/or privileges she previously enjoyed.

WE WILL make Maria Lourdes Cruz Sanchez whole for any lost earnings and benefits resulting from the unlawful suspension and discharge, less any net interim earnings, plus interest.

WE WILL compensate Maria Lourdes Cruz Sanchez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful April 4, 2014 suspension and the unlawful April 8, 2014 discharge issued to Maria Lourdes Cruz Sanchez and WE WILL, within 3 days thereafter, notify her in writing that this was done and that the discipline and discharge will not be used against her in any way.

ALIANTE GAMING LLC D/B/A ALIANTE CASINO AND HOTEL

The Board's decision can be found at www.nlrb.gov/case/28-CA-126480 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Nathan A. Higley, Esq., Elise Oviedo, Esq. (Stephen Wamser, Esq.), for the General Counsel.
Mark J. Ricciardi, Esq., Anthony B. Golden, Esq. (Fisher & Phillips, LLP), of Las Vegas, Nevada, for the Respondent.
Eric Myers, Esq. (McCracken Stemerman Bowen & Holsberry), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on October 14, 15, 16, and December 1, 2, 2014, pursuant to a complaint issued by Region 28 of the National Labor Relations Board (NLRB). The Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165, affiliated with UNITE HERE filed the charge on April 11, 2014,[1] and the General Counsel issued the complaint on May 30, 2014. The Aliante Gaming, LLC d/b/a Aliante Casino and Hotel (Respondent) timely filed answers denying the material allegations in the complaint (GC Exh. 1).[2]

The discriminatee, Maria Lourdes Cruz Sanchez (Cruz), was a hostess/cashier at the Respondent's Aliante Medley Buffet. The complaint alleges that the Respondent suspended Cruz on

[1] All dates are in 2014 unless otherwise indicated.

[2] The General Counsel exhibits are identified as "GC Exh." and Charging Party and Respondent exhibits are identified as "CP Exh." and "R. Exh." The closing briefs for the General Counsel, Charging Party and Respondent are identified as "GC Br.", "CP Br.", and "R. Br." The transcript is identified as "Tr."

April 4 and subsequently discharged her on April 8 because Cruz formed, joined, and assisted the union and engaged in concerted activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (Act).[3]

The General Counsel moved to amend the consolidated complaint during the hearing on October 3. The motion to amend was granted (Tr. 6, 7). The amended consolidated complaint alleges that the Respondent also violated Section 8(a)(1) of the Act when on April 4, a supervisor promulgated and has since maintained a directive or rule that its employees may not speak to its other employees about the discipline they receive (GC Exh. 1N).[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent, a corporation, operates the Aliante casino and hotel in North Las Vegas, Nevada, where it annually purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Nevada. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is engaged in the business of lodging, gaming, dining and entertainment at its facility. The Respondent is a stand-alone hotel and casino located 12–20 miles north of Las Vegas. At the time of the complaint, the Respondent has approximately 800 employees. The Respondent is not associated with any other gaming or hotel facilities in Las Vegas, but was previously one of 10 casino and hotel operations, collectively known as the Station Casinos (Station). The Respondent was purchased when Station was reorganized in a bankruptcy proceeding. The Respondent is not affiliated with any of the facilities owned by Station that continue to operate after bankruptcy. However, Station continued to manage the Respondent's operations until November 1, 2012, when the Respondent came under new management. The Respondent hired the majority of the workforce employed by Station and retained the employee handbook. The Respondent has hired additional employees and has updated its handbook since 2012. While the handbook retained the same seniority, dates of hire, vacation accruals, pay rates and benefits of employees previously with Station, the Respondent made revisions in the handbook, including the develop and implementation of new guest service standards (see below).

B. The Aliante Management Team

On November 1, 2012, the Respondent assumed total control of Aliante operations with a new management team. Terrance "Terry" Downey (Downey) became general manager of Aliante. He previously served as the general manger in several Station properties until his retirement in 2009. He served as a consultant to Aliante from July 2012 until he became the general manager in November 2012. Rich Danzak (Danzak) is the vice president of the human resource department at Aliante. He was hired as a consultant in June 2012 and became the vice president on October 1, 2012. Danzak was not previously employed by Station. Danzak is ultimately responsible for the discharge of Aliante employees.

Barbara Kelly (Kelly) is the human resource manager and works under Danzak. Kelly is responsible for labor relations issues and the discipline of employees. She is involved in making the recommendation to terminate an employee after consulting with the relevant department vice president(s) and Danzak (Tr. 98–100). Heidi Heath (Heath) is the risk manager and a co-equal to Kelly in labor relations functions. Heath was hired as a team member relations manager in 2011 and was recently promoted to her risk manager position. Heath currently holds both positions and handles investigations, employee concerns, training, and policy implementation. She also handles workers compensation, safety, general liability, and anything related to risk management. Heath has the authority to recommend discipline and other personnel actions. Heath was previously employed by Station from 2000 to 2012 as a team member relations manager (Tr. 288).

Robert Bethune (Bethune) is the vice president for food and beverage at Aliante. Bonnie Schafer-Rabonza (Rabonza) was and is the buffet manager at the Aliante Medley Buffet restaurant since April 2013. Rabonza is responsible for the daily buffet operations and works closely with Bethune. Rabonza has the authority to recommend discipline, including discharge. Rabonza was previously employed by Station as an assistant beverage manager and buffet manager from 2009 until April 2012, when she left to work for the Red Rock casino. Rabonza was hired by Aliante in April 2013 under Aliante's new owners. Rabonza has two assistant buffet supervisors: Maya Culverson (Culverson) and Raschelle Williams (Williams). Rabonza testified that Cruz is a hostess and cashier at the buffet and has known her since February 2011 at the time Aliante was owned by Station (Tr. 452–454; 490).

C. Aliante's Disciplinary Policy

The Respondent maintains an employee handbook titled "Team Member Handbook" that contains personnel and employee policies (R. Exh. 11 at Tab R-S.2; GC Exh. 37). Danzak testified that most of the personnel and employee policies were carried over from the Station handbook. Danzak indicated that there were some personnel changes, but could not specifically recall the revisions made by Aliante. Danzak said the effective date of the Aliante's handbook was April 1, 2013 (Tr. 744,

[3] The complaint was consolidated with Case 28–CA–131592 on August 27, which involved a charge filed by Fernanda Chavez, an individual employed by the Respondent. During the hearing, I discussed the possibility of settlement and the parties entered into an agreement on December 1 with respect to this complaint. The settlement agreement was entered into the record (Tr. 591).

[4] The amendment also included a similar directive issued to Chavez on June 18, but, the parties did not litigate this issue inasmuch as the Chavez complaint was settled.

745). The handbook contains the company's progressive disciplinary policy relating to employee unsatisfactory work performance and conduct. The steps range from a simple notation on an information log of the infraction, verbal counseling, followed by a documented coaching, written warning, final written warning and separation. The disciplinary procedure also provides the right of management to forego progressive discipline in certain performance-related conduct, such as

> "Insubordination, physical altercations, rude, discourteous, offensive, abusive, threatening, intimidating, unprofessional conduct or behavior towards a guest, team member or supervisor."

Under such circumstances, the employee is given a Suspension Pending Investigation (SPI) and may be immediately terminated after the investigation (GC Exh. 6).

Danzak testified that there was no "look back period," meaning that a supervisor could consider all prior discipline when meting out new discipline, but subsequently testified to a 1-year look back period (Tr. 745, 747). Heath testified that any policy changes in the handbook from Station to Aliante were documented and notice of the changes was provided in writing to the employees. Heath believes that prior discipline is active for a 1-year look back and not 6 months.[5] She indicated that the 6 month look back was the policy at Station. She said the 1-year change was not placed in writing, but employees were informed of the 1-year period when they are issued disciplined (Tr. 302–304).

D. The Aliante's SOAR Standards

Aliante developed its own unique customer service philosophy called SOAR after taking over management from Station. SOAR is an acronym that stands for *S*mile and welcome, *O*pportunity, *A*nticipate, and *R*emember. Downey testified that the Aliante property is more than 20 miles from downtown Las Vegas and does not get the pedestrian traffic similar to other casinos on the Strip. Downey said that Aliante must concentrate on customer service and amenities to attract guests. Downey testified that "we kind of make (sic) our stand on the quality of our product and the quality of our service is better than our competitors" (Tr. 193, 194). Danzak testified that he developed the SOAR principles with the training manager. Danzak insisted that SOAR did not exist under Station, but admitted that Station had some similar customer service policy in effect (Tr. 745–747, 777, 779). Danzak said that all employees have been trained on the SOAR philosophy (Tr. 748).

Under SOAR, there are specific standards for guest interactions for the staff working at the Medley Buffet. It was expected for the employee working in the buffet cashier position to know the 10/5 rule, which required the "staff to acknowledge (smile/make eye contact) guests and fellow team members within 10 (feet) and initiate a friendly verbal greeting (smile, eye contact, speak to the guest first) within 5 (feet)" (R. Exh. 2 at Tab R-B.1).

[5] Cruz testified that there was a 6 month look back period (Tr. 604).

E. The Union Activity at Aliante

The union has been engaged in organizing employees at the Station casinos prior to 2010. The organizing campaign at the various Station facilities has included contentious activities such as regular pickets, rallies, civil disobedience, and police arrests and media publicity. The Board has also found multiple violations of the Act against Station Casino in 2012.[6]

The union has been organizing Aliante employees since it was sold to the new owners. The parties agreed that the union's organizing activity in Aliante operated by the Respondent was generally limited. There were no pickets, rallies or other visible organizing activities at the Aliante property. Some Aliante employees continued to wear union buttons left over from the Station union campaign. Downey testified that he was aware of the union activity at Aliante when he became general manager because the activity continued from the time Aliante was owned by Station. Downey said that he was aware of employees wearing union buttons while working and that union placards were displayed in the employee cafeteria. Downey denied that the union activity was a campaign (Tr. 188–190). Downey described the union activity as "fairly quiet" towards the end of 2013 (Tr. 222, 223).

However, there was an increase in union activity at Aliante in early 2014. On February 5, the union requested that Aliante enter into card check and neutrality agreements for employees to decide on unionization (CP Exhs. 14, 15). A meeting was held between Danzak and Downey to discuss the card check request and whether Aliante employees were interested in unionizing (Tr. 814). Other forms of union activity were also discerned by Aliante management during this time frame. On February 7, Danzak discussed the union's handbilling in the company's lunchroom. Cara Welk, director of security, reported to Danzak that a handmade table tent was set up in the employee cafeteria and handbills were being distributed (CP Exh. 3). Danzak instructed her that the handbills should be discarded if found lying around after the union had left the cafeteria. On February 8, Danzak and Downey also discussed a flyer distributed by the union regarding health benefits provided to Aliante employees as compared to the benefits received by union employees at other casinos. Danzak was concerned that the flyer was misleading the employees because it had incorrect information regarding the cost of Aliante's health plan. Danzak and Downey met over the contents of this flyer (CP Exhs. 2, 3. Tr. 234–236).

On or about February 9, there were discussions between Downey and Danzak regarding Downey's concerns that some Aliante employees were visited by union activists at their

[6] *Station Casinos, LLC, Aliante Gaming, LLC, d/b/a Aliante Station Casino & Hotel, Boulder Station, Inc., d/b/a Boulder Station Hotel & Casino, NP Palace, LLC, d/b/a Palace Station Hotel & Casino, Charleston Station, LLC, d/b/a Red Rock Casino Resort Spa, Santa Fe Station, Inc., d/b/a Santa Fe Station Hotel & Casino, Sunset Station, Inc., d/b/a Sunset Station Hotel & Casino, Texas Station, LLC, d/b/a Texas Station Gambling Hall & Hotel, Lake Mead Station, Inc., d/b/a Fiesta Henderson Casino Hotel, Fiesta Station, Inc., d/b/a Fiesta Casino Hotel, and Green Valley Ranch Gaming, LLC, d/b/a Green Valley Ranch Resort Spa Casino*, 358 NLRB No. 153 (2012).

homes. There was also a follow-up email to Heath and Kelly regarding the house visits by the union. Downey was "very concerned" that the union was at employees' residences (Tr. 188, GC Exh. 14). Heath replied back on February 10 that she had not heard of such recent house visits but advised employees to contact the police and press harassment charges as necessary. Heath denied that she documents union activities at Aliante. She indicated that Station had an electronic system to document union activity, but that system is not in place with Aliante. Heath did admit that employee complaints about union harassment are preserves in the employee's personnel folder (GC Exh. 14, 10; Tr. 291–296). Downey admitted there was an increase in union activity during this time frame (Tr. 190). The vice-president of hotel operations, Michelle Garcia, described the increase in union activity as a "spike" (GC Exh. 14). Danzak denied there was an increase or spike in union activity, but did describe it as a "slow roll" (Tr. 757–759).

F. The Discharge of Maria Lourdes Cruz Sanchez

Cruz was hired as a host/cashier at Aliante property on October 13, 2008 and continued to work after ownership by the Respondent. Cruz worked at the Aliante Medley Buffet and her work shift was Tuesday through Saturday from 1:30 to 9 p.m. Medley Buffet is open from 7 a.m. to 10 p.m. and serves over 1500 guests on a daily basis. As a cashier, Cruz would greet the guests; assign tables to the guests; acknowledge any complimentary vouchers; verify casino membership status; accommodate any special needs required of the customer; and handle monetary transactions behind the cashier counter. Cruz would also serve one day per week as the host and would escort guests to their tables. Cruz was supervised by Rabonza, Maya (Culverson) and Raschelle (Williams). Cruz worked as a host cashier until she was discharged on April 8. Since June 15, Cruz has been employed as an external union organizer with the Culinary Union Local 226 (Tr. 600, 601).

Cruz has been disciplined on three occasions since the time the Respondent took complete operations of Aliante in November 2012.[7] On May 2, 2013, Cruz received a performance document by Rabonza for being disrespectful to a buffet guest. The discipline was a documented coaching to remind Cruz to perform as required under the SOAR standards. Cruz replied that the guest complained to her about the price of the buffet. Cruz informed the customer that she only works at the buffet and has no control over the prices. Cruz believed that the complaint was lodged because the customer did not like the response given by her (Tr. 604, 605; GC Exh. 25).

According to Rabonza, the coaching document was justified because it was sufficient that the customer perceived that Cruz was rude even if the employee was not (Tr. 685, 686). Heath testified that Cruz came to see her in May 2013 regarding the customer complaint and after receiving her verbal coaching. According to Heath, they discussed ways to change the guest perception that Cruz was unsmiling, not speaking and was unfriendly (Tr. 300, 301).

[7] Cruz' prior discipline was allowed into the record as background information and to show the progressive nature of the Respondent's discipline policy.

1. The Discipline of Cruz for the April 1 Incident

On April 3, Cruz received her second discipline. Cruz received a written warning on April 3 because she allegedly questioned a buffet customer about her disability on April 1. At the entrance to the Medley Buffet, there are two lines that customers queue for seating. Facing the entrance to the restaurant from the casino floor, the VIP line is closest to the cashier counter. The VIP line is for customers with high-roller membership cards and people with disabilities. The host cashiers are trained not to inquire about the non-observable disabilities but to let those customers through the VIP line.

Culverson was working the buffet area on April 1 when another employee informed her about a customer complaint regarding Cruz. In an email dated April 7, supervisor Culverson informed Heath, Rabonza and Williams that she gave verbal corrective counseling to Cruz on April1 because Cruz was questioning the buffet customer about her disability. According to Culverson, Cruz admitted to asking the customer about her disability. Culverson stated to Cruz that the customer filed a complaint and that it was the casino policy not to question the membership status or disability of a customer waiting on the VIP line (GC Exhs. 22 at 8).[8] The time and attendance card for Cruz confirmed a verbal counseling given by Culverson on April 1(GC Exh. 32; Tr. 465).

According to Heath, employees are not to question customers if they do not have proper credentials to be on the VIP line or if the customer is disabled. Heath testified there is no policy to turn customers away from the VIP line (Tr. 308, 309). The performance document stated that on April 1, Cruz had questioned a customer about her disability which was rude and discourteous to the customer. In addition to the verbal counseling, supervisor Williams issued Cruz a written warning on April 3 towards the end of Cruz' work shift (GC Exh. 23).

Cruz said she was well aware of the company policy not to inquire about the disability of a customer waiting on the VIP line. She denies asking the customer about her disability. Cruz did not sign the copy of the performance document but instead kept her copy and informed Williams that she wanted to speak to Rabonza the following day (April 4) before signing the document. Cruz met with Rabonza on April 4, but lamented that she was not given the opportunity to explain what happened. Instead, Rabonza told Cruz that she was suspended and was sent home. Cruz did not go home, but went to see Heath. Heath confirmed that Cruz was suspended. Cruz said that Rabonza never gave her a reason for the suspension. Heath replied that she could not divulge the reason at this time but told Cruz to return to her office on April 7 (Tr. 610–614).

2. The Interaction Between Cruz and Terrance Downey

Cruz has been a union member since 2006 and served as a committee leader while employed at Aliante. As a committee leader, Cruz would attend meetings, discussed employment issues, union rallies and marches with coworkers. Cruz would also discuss union leaflets and fliers with coworkers (Tr. 599-601; see fliers at C Exhs. 2 at 3 and 6 at 2). Cruz' support for

[8] There was a subsequent email from Culverson to Heath on May 6 that further elaborated the April 1 incident (GC Exh. 35).

the union is known by the union button she wears on a daily basis while on the job. The union button is 1 ¾-inch diameter and horizontally divided exactly in half by a line with the top portion in bright white and the bottom half in bold red. The white portion of the button states: Culinary/Bartenders Local 226/165 in capital letters and in the red portion: Committee Leader, also in bold capital letters (C Exhs. 7 and 11).

On April 3, Cruz was working at the Medley Buffet cashier counter at the non-VIP line. Cruz testified that her uniform consists of black slacks and a black vest over a dark green blouse. Cruz wears the union button on the right side and the Aliante name tag on the left side of her black vest at chest level. The name tag and union button are at the same level and neither one is obstructed by other garments. Cruz is relatively short (under 5 feet 5 inches), but testified that her name tag and union button is readily visible when she is working behind the cashier counter (Tr. 639–643). According to Cruz, at approximately 2 p.m., she observed a gentleman with a party of five people coming from the casino area to the counter. Cruz testified that she was not looking down when the party arrived but greeted the man with "Hi, how are you?" Cruz maintained that the man was sharply focused on her union button. Cruz said that the man did not return the greeting but proceeded to drop a complimentary voucher on the counter in front of her. Consistent with company policy, Cruz asked the man for his ID. The man retrieved his driver's license from his wallet and it is alleged that the man turned to the group of people[9] and remarked "She wants to see my ID." Everyone had a good laugh. Cruz said that she compared the ID with the name and signature on the voucher (GC Exh. 17). Cruz testified that the name on the voucher did not match the ID and informed the man, "Sir, your name doesn't match with the comp" (Tr. 617, 618). The man allegedly informed Cruz that he was the person that had authorized the voucher and his name and signature was on the bottom of the voucher. Realizing this, Cruz returned the ID, and said "Thank you, sir." At this point, another buffet employee approached the counter and recognized the man as Terrance Downey, said "hello" to him and escorted the party to a buffet table. Downey did not join the party, but left the buffet area. Cruz maintains that she did not recognize Downey's name and signature on the voucher and did not know who he was until informed by the other employee (Tr. 619).

In contrast, Downey testified that he arrived at the buffet counter between 2–2:30 p.m. with a party of five people. Downey testified that Cruz was busy looking down at the counter when he approached her and she never looked up to greet him. Downey testified that Cruz did not look at him and did not smile (Tr. 260). Downey testified that he did not know Cruz (Tr. 258), but remembered that Cruz was wearing a union button. Downey did not recall what was on the button and did not remember reading Cruz' name tag (Tr. 211, 260, 284). Downey testified that he remembered seeing the union button when he placed the voucher down on the counter (Tr. 258). At this point, Cruz asked Downey for his ID. Downey retrieved his driver's license and while doing so, he made humorous comment that Cruz was asking for his ID. Downey said that the group was approximately 20 feet from the counter. Downey agrees that by asking for his ID, Cruz was consistent with proper company policy. However, he maintains that Cruz mistakenly believe that he was the guest on the voucher when she told him that his ID did not match the guest name on the voucher. (Tr. 214, 260–262).

Downey said he had to correct Cruz by pointing to his name and signature at the bottom of the voucher. Downey believed that Cruz should have paid more attention to the guest name on the voucher and to his printed name and signature on the bottom of the voucher. Downey maintains that Cruz never looked up during this entire transaction even when she asked him for ID until another employee approached the counter, recognized Downey, greeted him and escorted the party to the table (Tr. 263, 264).

Downey testified that he did not stay with the party but walked towards his office, approximately 5 minutes away from the buffet area. He or his secretary called Bethune, the vice-president of food and beverage. Downey said that Bethune came to see him within 5 minutes (Tr. 205–208). Downey said they began discussing the incident at the Buffet by saying that he ". . . just had a very bad experience with the cashier at the Medley Buffet." Downey said that he did not know the name of the cashier but believed that Rabonza would know who was stationed at the buffet counter at that time (Tr. 209, 210, 267).

Downey testified that Rabonza walked by within a "few minutes" of his conversation with Bethune. Downey did not recall exactly what he said to Bethune, but recalled that Bethune shook his head and said ". . . that's not the kind of service we're trying to provide" (Tr. 266, 267). Downey described the cashier to Rabonza as a "shorter Hispanic lady." Downey denied that Rabonza identified the cashier as Cruz at that time. Downey said that Bethune and Rabonza then left the office and assumed that they were going to investigate what had happened (Tr. 266–268).

Directly over the cashier counter at the Medley Buffet are cameras used as surveillance and there is a record of any occurrences. The cameras are mainly focused on the cashier transactions to guard against theft and other inappropriate activities. Downey testified that he went to the surveillance room with Lou Dorn, the general counsel of Aliante at that time, shortly after Bethune and Rabonza left his office. Downey said that the camera was directly overhead the cashier and he viewed the top of Cruz' head on the video tape. The video tape has no audio. Downey testified that the video only showed his arms and hands and not his face. He also did not know who the cashier was in the video. Downey asserted that the cashier was identified to him as Cruz only after her discharge (Tr. 268, 268).[10]

Rabonza testified that she received a call from Bethune between 3–4 p.m. on April 3 (Tr. 469, 510). Rabonza said that

[9] Cruz believed that the group was approximately 12 feet from the counter.

[10] The video tape of the buffet incident was subpoenaed but Downey testified that the events recorded on the video are routinely written over after 7 days. Downey admitted that the video could have been saved if requested. He is not aware if any supervisors had requested to security office to save the video tape (Tr. 270–272).

Bethune asked her to go with him to review the surveillance video regarding an incident with Downey at the Medley Buffet because Downey did not know who the cashier was. In contrast to Downey's recollection, Rabonza testified that she never went to Downey's office; never spoke to Downey about the incident; and never participated in the Downey/Bethune meeting (511–512).

Rabonza said that she went to the surveillance room with Bethune. She insisted that she spoke to no one in management except Bethune. Rabonza said that she viewed the video tape from a camera directly overhead the cashier area and observed Cruz looking down just prior to Downey walking into the camera view. Rabonza said that the camera view was at a wide angle even though it was above Cruz' head and she was able to view Downey walking towards the counter. Rabonza said she recognized him because she saw her face as he entered the camera angle from the top of the screen. Rabonza maintained that she also saw the group of people with Downey. Rabonza said that Cruz was working on a cross-word puzzle at the counter and moved towards the cash register when Downey appeared. Rabonza also recalled Cruz looking at Downey's ID, but insisted that Cruz never looked up during the entire interaction (Tr. 512–530).

Rabonza said that her role in viewing the video was to identify who was the cashier at the buffet interacting with Downey (Tr. 532). Rabonza said that she reached no conclusions as to whether Cruz had violated any SOAR principles. According to Rabonza, it was Bethune who related to her the following

> He just said your hostess cashier failed, all the SOAR things, she didn't smile, she didn't this, she didn't that. I didn't see her not smiling.[11]

Rabonza said that she discussed with Bethune on the way out of the surveillance room, that Cruz violated the 10/5 rule for not looking up and greeting Downey as he approached within 10 feet and not speaking to him within 5 feet of where Cruz was standing. She said they went to see Danzak and informed him as to their observations on the video tape. Rabonza said she could not recall telling Danzak anything except identifying the cashier as Cruz. Rabonza then went home and spoke to no one else after meeting with Danzak (Tr. 535–541).

Rabonza testified that she was deciding on the type of discipline to Cruz for the incident on April 1 regarding the disabled guest. Rabonza said that she emailed Heath on April 3 at approximately 3 p.m. for information on Cruz' discipline in May 2013 (GC Exh. 31). Rabonza said that at this point in time, she was not yet aware of the Downey incident when she decided to issue Cruz a written warning for the April 1 incident (Tr. 467-470; 490).

Danzak testified that Rabonza and Bethune came to see him around 3 p.m. after reviewing the video tape. Danzak said that Rabonza identified Cruz as the cashier in the video and Bethune described how Cruz violated the SOAR principles. Danzak said he never viewed the video, but did review Cruz' personnel folder on the computer. Danzak said he assigned Heath to conduct an investigation over the incident (Tr. 760–762).

[11] Tr. 531.

3. The Discipline of Cruz for the April 3 Incident

Heath testified that she conducted the investigation while Cruz was on suspension. Heath said that it was late in the afternoon on April 3 that Rabonza and Bethune caught her as she was leaving for a meeting. According to Heath, Rabonza and Bethune had not yet reviewed the video but had identified to Heath that the cashier was Cruz. Heath replied that she was on her way to a meeting and depending on what the video shows; it could be a final warning or a suspension. Heath said that she had not viewed the video at this point in time (Tr. 310, 311). On April 4, Heath discussed with Danzak regarding the April 3 incident and it was decided that Cruz would be suspended pending an investigation. This information was related to Rabonza before meeting with Cruz (Tr. 312).

On April 4, Rabonza met with Cruz at the beginning of her shift at 1:30 p.m. As noted above, Cruz wanted to speak to Rabonza regarding the incident on April 1 with the disabled guest before she acknowledged the written warning on her performance document (GC Exh. 23). Cruz said that she went to see Rabonza at the beginning of her work shift at 1:30 p.m. Cruz waited a few minutes and went in to Rabonza's office. Rabonza was sitting by her computer and Williams was also present. Rabonza was aware of Cruz' written warning that Cruz received from Williams. She turned to Cruz and stated that "You're (Cruz) in trouble" and "you are being suspended." Cruz was given a performance documentation dated April 4[12] with a checked-off box: Suspension Pending Investigation (SPI). The document was signed by Williams and Rabonza (GC Exh. 24).

According to Cruz, upon leaving the meeting, Rabonza allegedly said to Cruz, "do me a favor, go home and don't tell anybody, because nobody knows anything about it" (Tr. 614). Cruz testified that since Rabonza refused to tell her the reason for the suspension, she went to see Heath. Cruz said that Heath could not discuss the reason for her suspension, but told Cruz to return on April 7 at 1:30 p.m. (Tr. 615, 616). In contrast, Rabonza denied making the statement that Cruz could not speak to anyone regarding her discipline. Rabonza testified that she informed Cruz that management would not discuss her discipline at that time (Tr. 690, 691).

During the investigation, Heath collected statements from Culverson and Rabonza regarding the Downey/Cruz interaction (GC Exh. 22). Heath reviewed Cruz' May 2013 incident regarding a guest complaint over the pricing of the buffet; the written warning received by Cruz for the April 1 incident regarding the disabled guest; and Cruz' failure to follow the SOAR standards with Downey on April 3 as the three reasons for discharging Cruz. Based upon this review and her discussions with Danzak, Kelly, Rabonza, and Bethune, it was decided on April 8 to discharge Cruz (Tr. 312–315).

Cruz returned to meet with Heath on April 7. This was considered a due process meeting and only attended by Cruz and Heath. During the meeting, Heath took some notes (GC Exh. 19) as to Cruz' position over the April 1 and 3 incidents

> She feels that she followed SOAR Above the Rest behaviors

[12] Williams mistakenly dated her signature as April 14, 2014.

—has been working hard since the discussion we had in May about the guest complaint. She has been trained to make sure both the ID's and comp slip names match.
—the names (first) were different.
—didn't recognize the GM as an employee because he didn't have a name tag on.
—was embarrassed when he joked with the other guests in the party about not knowing him and needing his ID
—realized he worked here when Emily came over.

She smiled and greeted him, is sure she looked up and did what she was supposed to do. Written Warning-
She denies questioning the guest who complained about her disability.
—she knows it is illegal to ask about disabilities.
—when the woman presented her player's card, she told her next time she needed to pay in the regular line – not the VIP and handicapped
line.
—she told her because that is what they have always done.
Declined writing a statement.

Heath testified that Cruz accepted the fact that her guest service could be better and that Cruz was willing to take ownership of her discipline (Tr. 450). On April 8, Cruz received a phone call from Rabonza and was instructed to return to the HR office the following day. Cruz was discharged on April 8 for "rude, discourteous behavior towards a guest" (GC Exh. 26). On April 9, Cruz arrived at the HR office at 9 a.m. and received a copy of her discharge notice from Rabonza and she then completed her paperwork for the discharge (Tr. 624, 625; GC Exh. 27).

DISCUSSION AND ANALYSIS

a. Credibility

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

b. Application of the Wright Line Standard

Section 8(3) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities of the purpose of collective bargaining or other mutual aid or protection.

The General Counsel asserts that the Respondent violated Section 8(a)(3) and (1) by discharging Cruz in retaliation for her union activity. An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). The Respondent asserts that Cruz was discharged for repeatedly failing to follow the SOAR standards and was progressively disciplined.

Analysis of Cruz' discharge is governed by the burden-shifting framework set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); also, *Nationsway Transport Services*, 327 NLRB 1033, 1034 (1999). Under *Wright Line*, the General Counsel must prove that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Hawaiian Dredging Construction Co., Inc*., 362 NLRB No. 10 (2015).[13]

If the General Counsel carries that initial burden, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. See *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros., Co.,* 303 NLRB 638, 649 (1991). To meet this burden "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *Durham School Services, L.P.*, 360 NLRB No. 85 (April 25, 2014). If, however, the evidence establishes that the reasons given for the respondent's action are pretextual, the respondent fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails. See *Golden State Foods Corp*., 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp*., 255 NLRB 722 (1981).

Under *Wright Line*, I find that the General Counsel has established the initial burden to show that protected conduct was a motivating factor in the employer's decision. The elements commonly required to support a finding of unlawful motivation are union activity, the employer's knowledge of that activity, and evidence of animus. Knowledge of an employee's union activities may be proven through direct or circumstantial evidence, including "the employer's demonstrated knowledge of general union activity, the employer's demonstrated union animus, the timing of the discharge in relation to the employee's

[13] In *Hawaiian Dredging Construction Co., Inc.,* the Board did not specifically discuss a fourth element of *nexus* under the Wright Line analysis as was applied in *Tracker Marine, LLC,* 337 NLRB 644 (2002). See, CP Br. at 22. In decisions subsequent to *Tracker*, the Board has stated that, "Board cases typically do not include [the fourth element] [nexus] as an independent element." *Wal-Mart Stores, Inc.,* 352 NLRB 815 fn. 5 (2008) (citing *Gelita USA, Inc.,* 352 NLRB 406, 407 fn. 2 (2008)); *SFO Good-Nite Inn, LLC,* 352 NLRB 268, 269 (2008); also see *Praxair Distribution, Inc.,* 357 NLRB 1084 fn. 2 (2011).

protected activities, and the pretextual reasons for the discharge asserted by the employer." *Kajima Engineering & Construction Inc.*, 331 NLRB 1604 (2000).

The first two elements are not disputed. There was increase union activity in February known to the managers and supervisors at Aliante. Downey testified that he was aware of union activity before and after February. Downey did not believe the union activity was at the level of an organizing campaign, but he nevertheless knew about the handbills, placards, button wearing, and flyers in the employee cafeteria. Other management officials, such as Heath, Welk and Kelly were also aware of the flyers in the cafeteria and raised concerns over visits by union activists at employees' residences. Garcia described the union activity as a "spike" in February. Heath agreed that there was an "upsurge" of union activity in February (Tr. 379). Danzak was also aware of union activity at Aliante. Although Danzak denied that there was an increase, he described the activity as a "slow roll." At the same time, the chief executive officer and a board member of Aliante became aware of union activity when they were sent letters by the union requesting check cards and neutrality agreements. Downey and Danzak were also aware and expressed concerns over the letters. Lou Dorn, the general counsel for Aliante at the time, described the union's letter for check card and neutrality agreements as a "very unusual letter" (CP Exh. 2; Tr. 236). Danzak met with Dorn and Downey over the contents of the letter.

I also find that management was aware of Cruz' union activities. Cruz was the union committee leader and often met with employees at the cafeteria to discuss labor and management issues. Cruz credibly testified that she wears her union button on a daily basis at work. Her union button states in bold letters her title of committee leader. Rabonza and Downey testified that they were aware of employees wearing union buttons while at work. Downey saw Cruz' union button on April 3 during their buffet interaction, but denied reading the button. I do not credit Downey's testimony on this point that he saw the union button but did not read the contents of the button. It would be difficult for me to accept how he would know it was a union button without reading the words on the button.

Under Section 7 of the Act, employees have the right to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In particular, "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act." *Republic Aviation Corp.,* above, 802 at fn. 7. Aside from the fact that Cruz was a committee leader and had engaged in Section 7 activities, Cruz was also engaged in the protected activity of wearing her union button when approached by Downey.

The General Counsel has also met the third and final element of its initial burden by showing that the Respondent harbored animosity towards the union and Cruz. The third element, *animus*, was readily established when the Respondent swiftly reacted to the heightened union activity in February and summarily discharged Cruz in an effort to forestall any union foothold on the Aliante property.

Discriminatory motive may be established through statements of animus directed to the employee or about the employee's protected activities. *Austal USA, LLC*, 356 NLRB 363, 363 (2010). Downey was opposed to the union representing Aliante employees. Downey specifically did not like the spike in union activity (Tr. 224). Garcia also believed there was a spike in union activity in February and wrote on the management electronic bulletin board that "I'm concerned about the recent (seemingly) spike in union activity…it bums me out." Downey replied, "I agree. I am very concerned" (GC Exh. 14). Heath also was upset over the visits of union members at employees' residences. Heath suggested that the employees call the police and file criminal charges if they felt harassed. Danzak directed the director of security to discard any union flyers or handbills in the employee cafeteria. Danzak and Downey were also upset over the union flyer regarding the health benefits cost incurred by Aliante employees as compared to employees in union casinos. Both were concerned and met over the union's request for card check and neutrality agreements.

I also find that Downey harbored animosity towards Cruz. Downey knew that Cruz was a union committee leader because he saw her title on the union button. However, Downey denied knowing Cruz, never saw Cruz' name tag and never identified her to Bethune.[14] I find that Downey was not credible on this point. Cruz' name tag was located at the same height and level as her union button. Downey was directly across the counter standing in front of Cruz. I do not credit Downey's testimony that he never noticed Cruz' name tag. Heath's statement of May 12 affirmatively had Downey identifying Cruz before the video was reviewed by him. Heath stated that Bethune had received a call from Downey to ". . . inform him of the poor service her (sic) had received from Maria (Cruz) while escorting a group of Guests to the Buffet. Terry informed Robert (Bethune) that when he got to the cashier, Maria . . . " (GC Exh. 21). Further, Rabonza's statement of May 9 also affirmed that Downey and Bethune knew the cashier was Cruz before the video was viewed (GC Exh. 34). Rabonza stated

> On Thursday April 3, 2014, I received a call from Robert Bethune, VP of F&B at approximately 3pm. He had received a complaint over poor guest service by one of the Hostess/Cashiers, Lulu. We went to the surveillance room to look at the video coverage. I reviewed video of the Guest interaction that took place at the cashier stand. As I watched the tape, it was definitely Lourdes (Lulu) Cruz.[15]

As such, I can only conclude that Downey knew the cashier was Cruz because he viewed the union button and the name tag

[14] In contrast, I credit Cruz' testimony that she did not know and did not recognize Downey as being the general manager of Aliante. Cruz unequivocally denied knowing Downey (Tr. 620–622). I have no plausible reason to question the sincerity of her testimony. No evidence has been proffered that Cruz harbored animosity against Downey and would have purposely treated him in a discourteous manner. Throughout my observations of Cruz as a witness, I find her soft spoken with her demeanor as being quiet and demurred.

[15] From this statement, it is clear that Rabonza's role was not to identify the cashier in the video but rather, to confirm that the cashier was in fact Cruz.

on Cruz at the buffet counter and was informed by Bethune of the cashier's identity before the video was viewed by Rabonza.

Rabonza also testified that in viewing the video, the camera angle was directly focused on the top of Cruz' head. Rabonza admitted that even if Cruz was smiling, the camera would not show that. Rabonza testified that it appeared that Cruz was not smiling, but then she indicated "…maybe she had a smile on her face" (Tr. 534). Also, it is reasonable to assume that Cruz had to look up to see if a guest was coming to the cashier counter (Tr. 529–531), which would be consistent with the SOAR principles. Rabonza stated that Cruz did look up; or "appeared to look up" towards the end of the voucher transaction (GC Exh. 22 at 2, 34). Rabonza stated she could not verify it was discourteous conduct (Tr. 535).

The inconsistent statements to the occurrence on April 3 are substantial. Downey testified that from the camera view directly above Cruz' head, the video only showed his arms and hands. Rabonza testified that her view of the video showed Downey and his group approaching Cruz. Rabonza testified that the guests were close enough to Downey to be observed in the video. Downey testified that his guests were a good 20 feet away. Rabonza said that the video showed Cruz was not smiling nor looking up, but she then stated that perhaps Cruz was smiling. Downey said that Cruz never smiled and never looked up. Rabonza testified that Cruz appeared to have looked up and she could not affirmatively state that Cruz did not smile. The inconsistency of statements as to what exactly occurred on April 3 between Downey and Cruz could have been resolved by preserving the video tape of the interaction, but no management official thought best to save the video. In my opinion, the failure of the Respondent to preserve the video tape of the April 3 event is a factor to consider in establishing discriminatory motivation against Cruz. Based upon the inconsistent statements by management officials, it is a reasonable inference to conclude that the tape was not preserved because it would have shown to be consistent with Cruz' testimony.

The timing of the discipline is also extremely suspect and more so when viewed against the backdrop of the Respondent's efforts to stave off the union organizing efforts. Upon seeing the union button worn by Cruz in the afternoon of April 3, the Respondent swiftly suspended her the following day. Additionally, various high-ranking Aliante officials, including Downey, Danzak, Kelly, Bethune, and Heath, involved themselves in disciplining a low-wage cashier. Although denied in testimony by Danzak that Downey's position played no factor in Cruz' discharge (Tr. 772), I find that Cruz was clearly made an example because she allegedly offended the general manager of Aliante. Cruz' discharge for offending Downey is viewed in contrast to Cruz receiving only a verbal counseling for also offending a customer on April 1. Cruz was subsequently issued a written warning for the April 1 incident only *after* Rabonza discovered that Downey was involved in the April 3 incident. Indeed, Heath testified that she was considering either a written warning or suspension for Cruz when informed by Rabonza and Bethune about the April 3 incident (but before she knew the guest involved was Downey). *LB&B Associates, Inc.,* 346 NLRB 1025, 1026 (2005) (the employer's adverse action against the employee immediately followed the employer's knowledge of that employee's protected activity supports an inference of animus); see also, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *State Plaza Hotel*, 347 NLRB 755, 755–756 (2006); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004).

I also find that the Respondent's failure to follow its own disciplinary policy and disparate treatment of Cruz demonstrates animus. Aliante's disciplinary procedure provides for the right of management to forego progressive discipline in certain performance-related conduct, such as "insubordination, physical altercations, rude, discourteous, offensive, abusive, threatening, intimidating, unprofessional conduct or behavior towards a guest, team member or supervisor." Heath testified that Cruz was discharged for being discourteous on 3 separate occasions. Cruz' first offense occurred in May 2013. Rabonza maintains that there were numerous other incidents between May 2013 and April 2014 regarding Cruz' discourteous behavior towards customers. Rabonza testified that Cruz "did not get along with a lot of the team member" (Tr. 491). However, Rabonza could not credibly state the number of complaints and no one in management documented such complaints against Cruz (Tr. 728). The record reflects merely 4 occasions that criticized Cruz' conduct with customers and other employees that were reflected in the employee log but not reduced to performance documents (GC Exh. 32B, 33B). Heath testified that Cruz did not receive a performance evaluation during the May 2013-April 2014 time frame (Tr. 302). Interesting, Rabonza inconsistently testified that Cruz' job performance had consistently improved, including for this same time period (Tr. 707).

According to the Respondent's discipline policy, Cruz could have been immediately discharged following her discourteous conduct in May 2013, but Cruz was given only a verbal warning. The next infraction occurred on April 2014, almost a full year subsequent to the first incident.[16] On April 1, Cruz was allegedly discourteous to a disabled guest. While the circumstances surrounding the April 1 incident were not relevant to this proceeding, the manner in which Cruz was treated becomes amply clear. Consistent with the May 2013 incident, Cruz was issued a verbal warning by Culverson for discourteous conduct towards a customer. Culverson, as Cruz' supervisor, determined the verbal counseling as sufficient for the infraction. The discipline of Cruz with a verbal counseling for the April 1 infraction should have ended the matter. However, her discipline was changed by Rabonza to a written warning upon learning of Cruz' interaction with Downey on April 3. It is my reasonable belief that the change to a written warning was done in

[16] There was contradictory testimony as to how far back discipline would be considered in issuing new discipline. Cruz believed that it was for only 6 months, consistent with the Station handbook policy. Heath testified that prior discipline would be considered up to 1-year. Danzak indicated that prior discipline can always be considered but subsequently stated that the look-back was for 1-year (Tr. 745, 747). Heath testified that revisions to the Aliante handbook taken from the Station handbook (such as time and attendance) would be noticed and provided in writing to the employees (Tr. 304). The change from a 6 month "look-back" to a 1-year "look back" was never reduced to writing and provided to the Aliante employees. As such, I credit Cruz' testimony that the look-back period is for 6 months rather than 1-year.

order to booster the suspension pending investigation and Cruz' eventual discharge.

Turning to the third and final discipline for the incident on April 3, the record is replete with statements from managers to justify their action to discharge Cruz. Numerous statements were made by Rabonza, Culverson and Heath that were changed and revised during and after the disciplinary investigation. Heath testified that the changes were merely language revisions (Tr. 323–325), but a close review of the statements show a deliberate effort to shore up the justification for discharging Cruz. Rabonza went through four iterations of her actions taken on April 3. From April 10 through May 9, Rabonza's statement changed from a simple paragraph to a more comprehensive narrative of the April 3 event[17] (GC Exh. 22; 34). Similarly, Heath requested that Culverson rewrite her statement at least twice because Heath was not satisfied with Culverson's narrative[18] (GC Exh. 22). The rewriting of the statements was not an effort to revise mere language as testified by Heath. In actuality, the statements serve to show that the same responsible officials were motivated to ensure and to justify the discharge of Cruz.

I find that discriminatory motive attributed to the Respondent was shown by the totality of the evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless. *Lucky Cab Co.*, 360 NLRB No. 43 (2014); *ManorCare Health Services-Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Considered together, the foregoing circumstances strongly support an inference of unlawful motive. See, e.g., *Wright Line*, above at 1090–1091, 1097; and *Carolina Steel Corp.*, 296 NLRB 1279, 1283–1284 (1989). Also, see *Healthcare Employees Local 399 v. NLRB*, 463 F.3d 909, 919 (9th Cir. 2006) ("circumstantial evidence is sufficient to establish antiunion motive."); and *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935–939 (D.C. Cir. 2011) ("most evidence of motive is circumstantial").

[17] A significant aspect of Rabonza's statement was the incorrect date of when the interaction between Cruz and Downey occurred. It was not until her May 9 statement, that Rabonza correctly stated that the incident occurred on April 3 (and not April 4).

[18] For example, Heath instructed Culverson to state "you stopped her (Cruz) after getting the main part of the story instead of stating that Culverson "interrupted" Cruz from explaining her side of the story on the April 1 incident. This is more than merely language change on the part of Heath and Culverson. It is my belief that it boosters the perception that management was tolerant with Cruz to allow her the opportunity to explain instead of being impatient and interrupting her side of the story.

c. The Respondent failed to meet its Rebuttal Burden

The burden now shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employee's union activity. *Wright Line*, above at 1089; *ADB Utility Contractors*, 353 NLRB 166 (2008). Given the strong evidence of discriminatory motive, the Respondent's rebuttal is substantial. *Bally's Park Place*, above; *Corliss Resources, Inc.*, 362 NLRB No. 21, JD slip op. at 14 (2015).

I find that the Respondent has not met its rebuttal burden of demonstrating that it would have discharged the alleged discriminatee even in the absence of her protected union activities. The Respondent argues that the SOAR principles were violated by Cruz when she failed to greet Downey within 10 feet and did not smile when he was within 5 feet of Cruz. As explained above, it is not clear whether Cruz had violated the SOAR principles. Cruz testified that she looked up, greeted Downey (and his guests) and said words to the effect, "Hello, how are you?" Rabonza testified that she could not discern whether or not Cruz was smiling. Rabonza stated that perhaps Cruz was smiling. Rabonza also admitted that it appeared that Cruz looked up when approached by Downey.

The Respondent further argues that the progressive discipline procedures were followed and would have taken the same action regardless of Cruz' union activities. Upon examination of the full record, I am also not persuaded that the Respondent so strictly adheres to the progressive discipline procedure to justify the discharge of Cruz. I find that Cruz was treated harsher than other employees and the same discipline would not have occurred absent her union activity. First, as noted above, the progressive discipline policy was not followed by the Respondent. I find it suspicious that the April 1discourteous infraction was elevated from verbal counseling to a written warning. No plausible explanation was provided for the change. Second, under the Respondent's progressive discipline policy, Cruz should have either received a final warning or suspension. It is noteworthy that Heath testified that she was contemplating either a final written warning or suspension when informed of the April 3 incident with Cruz but before realizing that Downey was the offended guest. Third, Respondent was not necessarily required to discharge an employee found to be discourteous to a guest or another employee. This was made clear when Cruz was not discharged for the May 2013 or April 1 incidents. The Respondent discharged Cruz only after Downey was subjected to Cruz' alleged discourtesy.

Moreover, the evidence of record shows that other employees were more leniently treated under similar circumstances. The Respondent did not terminate other employees who had similar or more severe incidents relating to guest service. For example, Chavona Bass, a host/cashier at the buffet insisted that a guest needed his pin number to get a buffet discount ticket and was told to go to customer service after the guest had waited on the buffet line for 20 minutes. Bass was documented with a written warning for making an offensive gesture by throwing her hands in the air and stating "there is nothing I can do with it." Bass was not discharge for her discourteous behavior towards a guest (GC Exh. 36C). Another example showed employee Jose Tirado working as a cook at the buffet, failed to comply with a guest request for an egg omelet and in a loud

voice rudely stated "I'm not going to do it because I'm busy." Tirado was disciplined with a written warning and was not discharged (GC Exh. 36D). Some employees were disciplined with final warnings for yelling at employees and for other violations in lieu of termination (GC Exhs. 36K, 36L, and 36N). Cruz never received a final warning before her discharge. The record also shows that some employees were terminated only after receiving a final warning. For example, Jeffrey Alexander was not discharged until after receiving three final written warnings (GC Exh. 36H). An employer's failure to follow its own practice of progressive discipline demonstrates animus. *Santa Fe Tortilla Co.*, 360 NLRB No. 130 at slip op. 3 (2014) (citing *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011)).

In sum, the record indicates that the Respondent makes disciplinary and discharge decisions on a highly subjective basis and inconsistent with its own progressive discipline policy. The Respondent failed to satisfy its burden that it would have discharged the employee even absent her union activities. Desert Toyota, 346 NLRB 118, 119 (2005).

d. The General Counsel failed to establish a violation of Section 8(a)(1) of the Act

The complaint states that during the April 4 meeting between Cruz and Rabonza, it is alleged that Rabonza told Cruz "do me a favor, go home and don't tell anybody, because nobody knows anything about it" after Cruz was informed of her suspension. The counsel for the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by promulgating a rule that employee cannot discuss their discipline, citing *Caesar's Palace*, 336 NLRB 271 (2001).[19] See, GC Br. at 22.

I find that the Respondent did not violation Section 8(a)(1) of the Act. The record shows, and I find, that Cruz was never instructed or given a directive not to discuss her discipline. Cruz testified that Rabonza told her "do me a favor…" In my opinion, an employee would reasonably believe this to be a suggestion by a supervisor and not a directive. In addition, the statement by Rabonza did not specify a consequence if Cruz decided to discuss her discipline with others. The General Counsel concedes this point.

I do not find that the statement made by Rabonza would chill Cruz' Section 7 rights to discuss her discipline or reasonably construed by an employee to be coercive. I find it significant that Cruz never testified that she thought the suggestion given by Rabonza was offensive, unreasonable, and coercive or tended to chill her right to discuss the discipline with others (Tr. 614). Further, as pointed out by the Respondent's closing brief, the suggestion from Rabonza to Cruz to "do me a favor…" is not a promulgation of a rule. The suggestion only applied to Cruz and no other employees (R. Br. at 33, citing *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 777 (2006). There is no evidence that at any time before or after the suggestion either Cruz or any other employee has been prohibited from engaging in permissible union activity.

Accordingly, I find that the Respondent did not violate Section 8(a)(1) of the Act by promulgating a rule prohibiting employees from discussing their discipline with other employees. This allegation in the complaint is dismissed in it's entirely.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Aliante Gaming, LLC d/b/a Aliante Casino and Hotel, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders union Local 165 Affiliated with UNITE HERE, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act on April 4, 2014, by discriminatorily issuing a suspension to Maria Lourdes Cruz Sanchez and subsequently discriminatorily discharge Cruz on April 8 because she was a union officer and engaged in union activity.

4. The Respondent did not otherwise violate Section 8(a)(1) of the Act promulgating a prohibitive rule.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily issued a suspension and termination to Cruz, must make her whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with the decision in *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), my recommended order requires Respondent to compensate Cruz for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarter(s) for Cruz.

My recommended order requires the Respondent to expunge from its files any and all references to the unlawful discipline of the aforementioned employee and to notify her in writing that this has been done and that the unlawful discharge will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

[19] The situation here is clearly distinguishable from *Caesar's Palace*, above. In *Caesar's*, the employees were given strict instructions not to discuss ongoing investigations on employee misconduct with the threat of discipline, including termination. Here, Cruz was never given instructions not to discuss her discipline nor was there a threat of discipline of any kind.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Aliante Gaming, LLC d/b/a Aliante Casino and Hotel, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily disciplining employees because of their union activities or to discourage employees from engaging in union or other protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Maria Lourdes Cruz Sanchez whole for any loss of earnings and other benefits suffered as a result of the unlawful suspension and discharge, as set forth in the remedy section of this decision.

(b) Compensate Cruz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarter(s).

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline of Cruz relating to the April 3 interaction with Terrance Downey, and within 3 days thereafter notify her in writing that this has been done and that the discipline will not be used against her in any way.

(d) Immediately offer Cruz full reinstatement to her former position or if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and/or privileges she previously enjoyed.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its existing properties in Nevada area copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 3, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 17, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefits and protection

Choose not to engage in any of these protected activities

WE WILL NOT discriminatorily discipline you because of your union activities or to discourage you from engaging in union or other protected concerted activities.

WE WILL NOT discipline you because of your activities with or support for Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union Local 165 affiliated with UNITE HERE.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL within 14 days of the Board's Order, remove any reference to the unlawful April 4, 2014 suspension and the unlawful April 8, 2014 discharge issued to Maria Lourdes Cruz Sanchez and we will notify Cruz within 3 days thereafter that this was done and that the discipline will not be used against her in any way.

WE WILL offer Cruz immediate and full reinstatement to her former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and/or privileges she previously enjoyed.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Cruz whole for any lost earnings and benefits resulting from the unlawful suspension and discharge, less any net interim earnings, plus interest.

WE WILL compensate Cruz for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarter(s).

ALIANTE GAMING, LLC D/B/A ALIANTE CASINO AND HOTEL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-126480 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.